# The Tort of Invasion of Privacy in Ohio: Videotape Invasion and the Negligence Standard

## I. INTRODUCTION

The right to privacy in the United States has as its formal roots the famous essay by Samuel Warren and Louis Brandeis, *The Right to Privacy*.[1] The article was written in response to the actions of "yellow" journalists of the day. The concept stated therein has continued to expand to the present day. The tort of invasion of privacy that resulted from that article is now seen in celebrated cases such as *Vance v. Judas Priest*,[2] and may provide protection from overzealous citizens using videocameras to aid police.[3] A cause of action for invasion of privacy has existed in Ohio since 1956.[4] Ohio law recognizes three forms of the tort. The first is an unreasonable invasion into another's private affairs; the second is an unreasonable appropriation of another's personality, name or likeness; and the third is publicity of another's private affairs in which the public has no legitimate concern.[5] The *Restatement of Torts* section 652A recognizes a fourth form known as the "false light" invasion of privacy.[6] Ohio has yet to accept this form of the tort.[7]

The purpose of this Note is to describe the development of the law in Ohio by examining the contours of the law and its possible application to recent events. This Note also will recommend changes to remedy inconsistencies arising in decisions. A succinct statement of the law is that an invasion of privacy is typically characterized by an intentional act that would cause mental pain intolerable to a reasonable person. A plaintiff may avoid the intentional element of invasion of privacy by claiming negligent infliction of emotional distress.[8] Compensatory damages are recoverable for any mental or physical injury caused. Punitive damages and attorney fees are recoverable if either physical injury accompanies the mental injury or the defendant acted with

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[1] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[2] Nos. 86-5844, 86-3939 (Nev. Dist. Ct. Aug. 24, 1990) (WESTLAW, Allfeds, 1990 WL 130920). This case was brought by the parents of a teenager who attempted suicide after listening to songs by the rock band Judas Priest. It was argued that the songs invaded the teen's privacy because they contained subliminal messages that encouraged suicide. It was held that subliminal messages were part of the songs but that they were not intentional.

[3] Beck, *Video Vigilantes*, NEWSWEEK, July 22, 1991, at 42, 47 (this article is a good discussion of what can happen when individuals take what can be good for society and carry it to extremes).

[4] Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

[5] *Id.* at 35, 133 N.E.2d at 341.

[6] RESTATEMENT (SECOND) OF TORTS § 652A (1977).

[7] Yeager v. Local Union 20, Teamsters, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983).

[8] Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

actual malice toward the plaintiff.[9] A defendant may be enjoined from further acts if necessary.[10] Third party liability is possible if the actor is aided by another.[11] The third party, however, must either know or have reason to know of the invasion in order to be held severally liable.[12] A claim for invasion of privacy can only be made by the one whose privacy is directly, or actually, invaded.[13] In Ohio, however, invasion of privacy is not strictly limited to living persons. Corporations, associations and government units can all claim tortious invasion of privacy.[14]

This Note will consider each form of the tort individually and then examine the elements common to all. In that way a concise and understandable explanation can be achieved resulting in a clear picture of the Ohio courts' view of the tort of invasion of privacy.

## II. INTRUSION INTO PRIVATE AFFAIRS

### A. *Private Nature of One's Affairs*

In *Housh v. Peth*,[15] the Ohio Supreme Court recognized that every individual has the right to live without unwanted interference. In *Housh*, the plaintiff's privacy was invaded by a creditor's collection activities.[16] A campaign of harassment by repeated telephone calls[17] was found to have invaded what Warren and Brandeis described as the plaintiff's "right to be let alone."[18] Additional examples of creditor activities that have been labelled harassment are the engagement of repeated collection actions against the wrong person,[19] and rude and abusive language during telephone calls and during in person visits by a creditor attempting to collect a debt.[20] While a creditor may

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[9] Columbus Finance, Inc. v. Howard, 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975).

[10] *Housh*, 165 Ohio St. at 37, 133 N.E.2d at 342.

[11] LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 134, 201 N.E.2d 533, 538 (1963).

[12] *Id.* at 132, 201 N.E.2d at 537–38.

[13] Young v. That Was The Week That Was, 312 F. Supp. 1337, 1340 (N.D. Ohio 1969) (citations omitted).

[14] Dayton Newspapers, Inc. v. City of Dayton, 23 Ohio Misc. 49, 67, 259 N.E.2d 522, 534 (1970), *aff'd*, 28 Ohio App. 2d 95, 274 N.E.2d 766 (1971).

[15] 165 Ohio St. 35, 133 N.E.2d 340 (1956).

[16] *Id.* at 36, 133 N.E.2d at 341.

[17] *Id.*

[18] Warren & Brandeis, *supra* note 1, at 195.

[19] Stephens v. Harmony Loan Corp., 37 Ohio App. 2d 23, 27–28, 306 N.E.2d 163, 166 (1973).

[20] *See* Mills v. First Nat'l Credit Bureau, 27 Ohio Op. 2d 267, 267–68, 192 N.E.2d 511, 512 (1963).

take "reasonable action"[21] to collect the debt, activities found to be a "campaign of harassment"[22] will support a claim for invasion of privacy.

A person's privacy is protected from other forms of intrusion such as telephone eavesdropping,[23] unreasonable visual observation,[24] physical intrusions,[25] and unreasonable mailings,[26] even if there is only one incident. The theoretical support for the tort of invasion of privacy could appropriately be described as protection for an individual's personal dignity.[27] In the case of telephone eavesdropping, the Franklin County Court of Appeals, in *LeCrone v. Ohio Bell Telephone Co.*, rejected the trial court's holding that the existence of a telephone tap, with no evidence of intercepted communications, could support a claim for invasion of privacy.[28] Therefore, lacking a physical intrusion or trespass in preparing to eavesdrop, an actual interception of a communication must occur to support a claim for invasion of privacy.[29] Visual observation may also be an invasion of privacy if the intent of the actor is to "harass or intimidate."[30] Legitimate surveillance or observation is tolerated, however. Legitimate surveillance allowed by Ohio courts can extend to the use of binoculars, a telescope and a camera, and even as far as placing a platform in a tree to acquire a better view.[31]

Physical intrusion is another basis for a claim of invasion of privacy. The physical invasion associated with installing telephone eavesdropping equipment is seen in *LeCrone v. Ohio Bell Telephone Co.*[32] Installing telephone equipment without another's knowledge may be an invasion of privacy; similarly, removing something from another's home also may be an invasion of privacy.[33] In the case of physical intrusion, a single event may be sufficient for

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[21] *Housh*, 165 Ohio St. at 40, 133 N.E.2d at 344.

[22] *Id.* at 41, 133 N.E.2d at 344.

[23] LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 133–34, 201 N.E.2d 533, 538 (1963).

[24] Sustin v. Fee, 69 Ohio St. 2d 143, 146, 431 N.E.2d 992, 994 (1982); Blevins v. Sorrell, No. CA89-10-060 (Warren County Ct. App. July 23, 1990) (WESTLAW, 1990 WL 102360).

[25] *LeCrone*, 120 Ohio App. at 133–34, 201 N.E.2d at 538. The physical aspect of this case was the installation of a second telephone line used for eavesdropping.

[26] McCormick v. Haley, 37 Ohio App. 2d 73, 77–78, 307 N.E.2d 34, 37–38 (1973).

[27] Bloustein, *Privacy as an Aspect of Personal Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

[28] *LeCrone*, 120 Ohio App. at 133–34, 201 N.E.2d at 537–38.

[29] *Id.*

[30] Sustin v. Fee, 69 Ohio St. 2d 143, 144, 431 N.E.2d 992, 993 (1982).

[31] *Id.* at 146, 431 N.E.2d at 994; Blevins v. Sorrell, No. CA89-10-060 (Warren County Ct. App. July 23, 1990) (WESTLAW 1990 WL 102360) at 3.

[32] 120 Ohio App. at 129, 201 N.E.2d at 533.

[33] Matthews v. Ohio Bell Tel. Co., C.A. No. E-82-8, C.P. No. 43709 (Erie County Ct. App. Oct. 15, 1982) (WESTLAW 1982 WL 6592).

the plaintiff to recover for invasion of privacy.[34] For example, if a mailing is "designed to harass and torment . . . a single act . . . can constitute an actionable invasion of the right to privacy when it is accomplished in such a manner as to outrage or cause mental suffering."[35]

The right to be free from unreasonable intrusion therefore protects persons in various aspects of life. Those protected aspects exhibited in Ohio cases include, (1) freedom from personal or telephone harassment; (2) security in one's personal communications; (3) security in one's home or personal place from physical intrusions; (4) freedom from unreasonable observation or surveillance; and (5) freedom from shocking or outrageous written communication.

### B. *Outrageous Nature of the Act*

The Ohio Supreme Court in *Housh*[36] explained that if conduct was such "as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities" the plaintiff is entitled to recover damages.[37] The standard in privacy cases is the "person of ordinary sensibilities."[38] However, there are examples in which a defendant, in this writer's opinion, has gone well beyond behavior expected in modern society, and yet no recovery for invasion of privacy was allowed.[39] Neither Ohio privacy cases nor the *Restatement*[40] support the proposition that a plaintiff claiming invasion of privacy may recover damages caused by a peculiarity that the plaintiff possesses. However, the *Restatement's* description of the tort of infliction of emotional distress, emotional distress also being an element of invasion of privacy, does recognize this possibility.[41] The Ohio common law of infliction of emotional distress has been interpreted to allow recovery by a plaintiff who possesses a peculiarity if

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[34] *Id.*; McCormick v. Haley, 37 Ohio App. 2d 73, 307 N.E.2d 34, 35 (1973).

[35] *McCormick*, 37 Ohio App. 2d at 78, 307 N.E.2d at 38.

[36] Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

[37] *Id.* at 39–40, 133 N.E.2d at 343.

[38] *Id.*

[39] *See* Reamsnyder v. Jaskolski, 10 Ohio St. 3d 150, 462 N.E.2d 392 (1984); Haller v. Phillips, No. 90AP-512 (Franklin County Ct. App. Sept. 27, 1990) (WESTLAW 1990 WL 140553). These two cases are good examples of the type of behavior that can lead to a suit for invasion of privacy. In *Reamsnyder*, the defendant told the plaintiff over the phone that he was going to tear the plaintiff's face off. In *Haller*, the defendant merely called the plaintiff a son of a bitch and asked the plaintiff's wife if the son of a bitch was home.

[40] RESTATEMENT (SECOND) OF TORTS § 652 (1977). This section speaks only in terms of "reasonable persons." A "special plaintiff" is not considered, and therefore not covered, by the section.

[41] *Id.* at § 46 comment f. "The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity."

the defendant is aware of the plaintiff's condition.[42] This standard is not applied to invasion of privacy cases at the present time.[43] In the interest of consistency it may be argued that the tort of invasion of privacy should consider any special attributes of the plaintiff. There is no reason to allow recovery for a "special plaintiff" based under one theory, infliction of emotional distress, and deny recovery under another, invasion of privacy, when both torts are based on the same type of injury.

The Hamilton County Court of Appeals has interpreted *Housh* to allow recovery for negligent invasion of privacy.[44] Although *Prince v. St. Francis-St. George Hospital Inc.*[45] has not been followed by other courts, this author believes it to be important for two reasons. First, the court acknowledged recovery for negligent invasion of privacy. Second, the defendant in *Prince* disclosed to the plaintiff's employer that the plaintiff had received treatment for alcoholism. It is reasonable to assume that a court may apply the same standard in other settings such as drug treatment or positive HIV tests. Additionally, Ohio recognizes a cause of action for negligent infliction of serious emotional distress.[46] Because both torts look to mental injury as the source of damages, an inconsistency in the law is created.[47] Similar to the "special" plaintiff who can recover by claiming infliction of mental distress but not by using invasion of privacy, a plaintiff claiming negligence may recover damages for infliction of emotional distress, but not invasion of privacy. Since Ohio courts have begun to allow recovery for negligence-based infliction of emotional distress, there is no reason not to allow negligence-based invasion of privacy, especially because both are based on the same type of injury. Therefore, this author believes that Ohio courts should allow recovery for negligently caused invasion of privacy. This approach could provide a great deal of protection for persons who are doing acts in what they believe to be a private place, even if in reality they are not.[48]

Accordingly, until the Ohio Supreme Court expressly holds otherwise, a plaintiff should be able to recover for negligent invasion of privacy, provided the elements of both negligence and invasion of privacy are met. At the present time, however, the Ohio Supreme Court has not conclusively decided the issues of "special" plaintiffs and negligence-based claims. Therefore, in spite of the unusually aggressive stance the Ohio courts have taken towards mental

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[42] *Reamsnyder*, 10 Ohio St. 3d at 155, 462 N.E.2d at 396.

[43] RESTATEMENT (SECOND) OF TORTS § 652 (1977); *see supra* note 40.

[44] Prince v. St. Francis-St. George Hosp. Inc., 20 Ohio App. 3d 4, 7, 484 N.E.2d 265, 269 (1985).

[45] 20 Ohio App. 3d 4, 484 N.E.2d 265 (1985).

[46] Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

[47] *Id.*; Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

[48] *Cf.* Reamsnyder v. Jaskolski, 10 Ohio St. 3d 150, 462 N.E.2d 392 (1984); *Schultz*, 4 Ohio St. 3d at 131, 447 N.E.2d at 110.

injury,[49] a person may choose to live any way he wishes, but recovery for intrusion into his life will most likely be judged on the basis of whether the intrusion is intentional and would outrage "a person of ordinary sensibilities."[50]

## III. APPROPRIATION OF ANOTHER'S NAME OR LIKENESS

### A. *Introduction*

The second recognized form of invasion of privacy in Ohio is the "unwarranted appropriation or exploitation of one's personality."[51] The *Restatement* uses the language "name or likeness" instead of personality.[52] The difference in terminology manifests itself in the types of appropriations that will support recovery. The essence of the tort is the use of some identifying feature of another, without the other's consent, and in such a way as to outrage a person of ordinary sensibilities, in an attempt to benefit from such unauthorized use.

### B. *Nature of the Interest Protected*

Ohio law does not limit the tort of invasion of privacy by appropriation of another's personality solely to cases of appropriation for financial or commercial use. The objective of Ohio law is the protection of "each individual['s] . . . exclusive use of his own identity."[53] This view reflects the *Restatement's* position on this topic.[54]

This conceptual basis manifests itself in the determination of damages. A plaintiff's damages are calculated on the injury to themselves, not on the unjust

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[49] *See* Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983) and Paugh v. Hambs, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983), and their progeny. In 1983 the Ohio Supreme Court allowed recovery for negligent infliction of emotional distress in *Schultz* and further explained the standards and factors which are applicable in *Paugh*.

[50] *Housh*, 165 Ohio St. at 39–40, 133 N.E.2d at 343.

[51] *Id.* at 35, 133 N.E.2d at 341.

[52] RESTATEMENT (SECOND) OF TORTS § 652C (1977). "One who appropriates to his own use . . . the name or likeness of another is subject to liability to the other for invasion of his privacy."

[53] Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 229, 351 N.E.2d 454, 458 (1976), *rev'd*, 433 U.S. 562 (1977). While reversed, the case contains an excellent discussion of the law and the interest protected.

[54] RESTATEMENT (SECOND) OF TORTS § 652C comment b (1977).

enrichment or benefit obtained by a defendant.[55] This view can create anomalous results when comparing private persons to public persons. For example, a public person that has invested heavily in her personality may recover a correspondingly large award. At the same time, a private person may suffer the same amount, but recovery will be less by virtue of the fact that there was no investment in her personality. Some states have codified the tort of invasion by appropriation. In New York, the tort is limited to recovery from defendants that have benefitted financially or commercially from the appropriation.[56] This approach effectively removes the private-public person distinction, because it is unlikely that someone would appropriate another's name or likeness for commercial use if that person's name or likeness had no public or commercial value. While it may be argued that this is the wiser approach, private persons are left relatively unprotected from unwarranted appropriations of their names or likenesses.

The interest protected by the invasion of privacy by appropriation has been described differently by various commentators. The difficulty appears to arise from the seemingly different interests a person has in presenting her personality or distinguishing characteristics to the public. A public figure depends on exposing (or licensing for exposure) her personality in order to profit from that personality.[57] Most individuals, however, prefer not to be exposed at all to the public at large, or to have their identifying characteristics used by anyone else. Dean Prosser views it as "proprietary,"[58] while Professor Bloustein prefers to unify all forms under a "human dignity" theory.[59] Professor Hyman Gross argues that both Prosser's and Bloustein's theories are in error.[60] This philosophic difference can manifest itself in the protection afforded differently situated plaintiffs as discussed in the prior paragraph.

Appropriation of a private person's identifying characteristics would seem to cause the required "outrage . . . mental suffering, shame or humiliation,"[61] when appropriation of a public person's identifying characteristics may not. While the differences between public and private persons are real, the interest protected can be unified under a theory of protecting the control of exposure of one's identifying characteristics. This would be the most logical way to identify the tort and to arrive at damages based on the injury to the individual plaintiff.

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[55] Schlessman v. Schlessman, 50 Ohio App. 2d 179, 182, 361 N.E.2d 1347, 1349 (1975). The defendant in this case signed the plaintiff's name to a tax return against the plaintiff's wishes.

[56] *See, e.g.*, N.Y. CIV. RIGHTS LAW § 50 (Consol. 1989).

[57] *See Zacchini*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd*, 433 U.S. 562 (1977).

[58] Prosser, *Privacy*, 48 CALIF. L. REV. 383, 406 (1960).

[59] Bloustein, *supra* note 27, at 962.

[60] Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 46–54 (1967).

[61] Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340, 341 (1956).

In this way, a public person can be compensated for an unauthorized appropriation of their identifying characteristics similarly to a private person. The major difference is the type of injury. A public person's damages are most likely to be lost revenues or the cost of the investment in his talent.[62] A private person's damages are most likely to be found in mental injury or "injury to his feelings."[63]

### C. *Incidental Use of Another's Personality*

While an unconsented appropriation of another's personality is not permitted, the use must be more than merely incidental.[64] The line between incidental use and appropriation is not a bright line. As *Vinci v. American Can Co.*[65] demonstrates, informational use of a person's personality without any intent to take advantage of that use is allowed by Ohio courts.[66]

The argument for appropriation to apply in situations similar to *Vinci* is that the presentation of the plaintiff on a product package or in an article tends to create an association between the product and the individual in the consumer's mind. In this way the defendant indirectly capitalizes on another's name or likeness. The courts presently do not agree with this position. The movement, however, toward allowing negligence-based claims in other forms of invasion of privacy may result in a relaxation of the "incidental use" bar to a claim of invasion of privacy by unwarranted appropriation. If a plaintiff can prove that he was harmed by the defendant's use of his personality and the defendant acted negligently toward the plaintiff, recovery may be possible. Although no case has been decided on this point, the allowance of invasion of privacy by appropriation is a logical extension of the movement identified in prior sections of this Note.[67]

### D. *Appropriation by News Reporting Services*

News publishing and broadcasting present special problems regarding first amendment rights of the press. The Supreme Court has held that the first and fourteenth amendments do not provide a blanket privilege to the press for

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[62] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1976).

[63] Schlessman v. Schlessman, 50 Ohio App. 2d 179, 181–82, 361 N.E.2d 1347, 1349 (1975).

[64] RESTATEMENT (SECOND) OF TORTS § 652C comment d (1977); Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 229, 351 N.E.2d 454, 458 (1976).

[65] No. 58857 (Cuyahoga County Ct. App. Sept. 27, 1990) (WESTLAW 1990 WL 139739).

[66] *Id.*, (WESTLAW 1990 WL 139739) at 2.

[67] *See supra* notes 41–44 and accompanying text.

reporting a public event.[68] The press may report a newsworthy event, but a person's identity still may not be appropriated for the media's use.[69]

There is some dispute over the definition of newsworthy,[70] and no expression of the meaning of newsworthy is found in Ohio cases. Therefore, this point will continue to cause difficulties and needs to be resolved. This author believes the standard should be that information reported should be "a meritorious contribution"[71] and not simply one of "widespread public interest."[72] A "meritorious contribution" may be described as information designed to "inform" or "educate," while a matter of "widespread public interest" would only "entertain or amuse."[73] This standard affords individuals more protection in a society in which considerable information is accessible and considered "newsworthy" by some members of the media.

The tort of invasion of privacy by intentionally appropriating another's identifying characteristics is complicated by the factors discussed above: news media and incidental use. However, as with the other form of invasion of privacy, the act must be outrageous or cause mental suffering to a person of ordinary sensibilities before a plaintiff can recover damages.[74]

## IV. PUBLICITY OF PRIVATE AFFAIRS

### A. *Introduction*

The Supreme Court of Ohio also has recognized in *Housh* the form of the tort when the actor has "publiciz[ed] . . . one's private affairs . . . with which the public has no legitimate concern."[75] It must be understood that "[p]ublicity here means communicating the matter to the public at large"[76] and not publication in the legal sense—a communication to at least one other person. Even publicity to a moderately large group, thirty to fifty people, often will not support a claim of unreasonable publicity.[77] The *Restatement*, which Ohio

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[68] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1976).

[69] *See id.*

[70] Comment, *The Right to Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722 (1963).

[71] *Id.* at 725.

[72] *Id.*

[73] *Id.* at 727.

[74] Housh v. Peth, 165 Ohio St. 35, 39, 133 N.E.2d 340, 343 (1956).

[75] *Id.* at 35, 133 N.E.2d at 340.

[76] Killilea v. Sears, Roebuck & Co., 27 Ohio App. 3d 163, 166, 499 N.E.2d 1291, 1294 (1985).

[77] Adams v. St. Elizabeth Hosp. Med. Center, No. 87-CA-180 (Mahoning County Ct. App. Mar. 16, 1989) (WESTLAW 1989 WL 25561).

courts generally follow in this regard,[78] describes the requirements of the matter communicated as "highly offensive to a reasonable person" and "not of legitimate concern to the public."[79]

### B. *Private Nature of the Matter Publicized*

The privacy tort of unreasonable publicity has an important limiting factor: the matter must be truly of a private nature. "[M]atters of public record about . . . birth or marriage date, or matters that the plaintiff leaves open to the public eye" do not give rise to liability if more publicity is given to them by another.[80] Examples of this view are the incidental videotaping of a plaintiff by a news reporter during a drug raid,[81] videotaping by a news reporter of a crime suspect in an open hallway at a sheriff's department building,[82] or printing the name and address of a crime suspect's parents.[83] This position is also supported by the *Restatement*, which states: "There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public."[84] There is little disagreement found in Ohio cases concerning this limitation.

Ohio has departed from the *Restatement* view concerning who is protected from unreasonable publicity. The *Restatement* speaks in terms of individuals. It does not generally recognize a claim for invasion of privacy by a legal entity.[85] The proposition that "[t]he right to privacy applies to individuals, corporations, associations, institutions and to public officials" is found in *Dayton Newspapers, Inc. v. City of Dayton*.[86] In that case a demand for entry into all government meetings was rejected on the theory that public entities require some degree of privacy. The court held that in the case of government units the "legislat[ure] or sovereign power" sets the amount of publicity about internal matters.[87]

An unanswered question on this topic is whether a legal entity could recover damages as well as prevent access to private matters. However, the City of Dayton did not claim that its privacy had been invaded in order to

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[78] *See Killilea*, 27 Ohio App. 3d at 166–67, 499 N.E.2d at 1294–95; Penwell v. Taft Broadcasting Co., 13 Ohio App. 3d 382, 384, 469 N.E.2d 1025, 1028 (1984).

[79] RESTATEMENT (SECOND) OF TORTS § 652D (9)(a)-(b) (1977).

[80] *Killilea*, 27 Ohio App. 3d at 166-67, 499 N.E.2d at 1295.

[81] *Penwell*, 13 Ohio App. 3d 382, 469 N.E.2d 1025 (1984).

[82] Haynik v. Zimlich, 30 Ohio Misc. 2d 16, 498 N.E.2d 1095 (1986).

[83] Strutner v. Dispatch Printing Co., 2 Ohio App. 3d 377, 442 N.E.2d 129 (1982).

[84] RESTATEMENT (SECOND) OF TORTS § 652D comment b (1977).

[85] *Id.* at § 652I, "Except for appropriation . . . an action for invasion of privacy can be maintained only by a living individual . . . ."

[86] 23 Ohio Misc. 49, 67, 259 N.E.2d 522, 534 (1970), *aff'd*, 28 Ohio App. 2d 95, 274 N.E.2d 766 (1971).

[87] *Id.* at 67–72, 259 N.E.2d at 534–37.

recover damages. The city used privacy as a defense against a declaratory judgment action brought in an attempt to force all meetings to be open to the public.[88] It is doubtful that a legal entity could recover damages because the tort of invasion of privacy is personal to the plaintiff, and therefore, damages would be extremely difficult to prove.[89] Injury to employees or officials cannot be used.[90] A separate claim specific to that person must be brought. This writer has been unable to identify a method of proof, and so the remedy for a legal entity may be limited to enjoining future acts.

### C. *Outrageous Nature of the Publicity*

The publicity must also be "outrage[ous] or cause mental suffering" or be highly offensive.[91] Although this form of invasion of privacy is recognized in *Housh*, examples of acts fulfilling this element of the tort are not found in later Ohio cases. Decisions in the preceding paragraphs of this section were based on the public nature of the matter publicized and not on the outrageousness or the mental suffering caused. The Franklin County Court of Appeals has stated that a plaintiff may be able to prove invasion of privacy on the facts of *Killilea v. Sears, Roebuck & Co.*[92] The plaintiff here was being detained by a store employee. She claimed humiliation caused by being "'paraded' . . . through the store . . . [and being] continually subjected to great public awareness of her detainment."[93] The connection between the torts of invasion of privacy and infliction of emotional distress is so close that they are often pleaded together.[94] The case may then be decided on a mental suffering theory as opposed to a theory of unreasonable publicity given to private matters. An application of the mental suffering theory results in a lower negligence standard.[95]

### D. *Effect of Time on Unreasonable Publicity*

An issue complicating the publicity tort is the time element. A person who is a public figure is entitled to less privacy than a private figure;[96] however, the

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[88] *Id.*

[89] Young v. That Was The Week That Was, 312 F. Supp. 1337, 1340 (N.D. Ohio 1969) (citations omitted).

[90] *See* Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandries [sic]*, 20 J. MARSHALL L. REV. 607, 610–11 (1987).

[91] Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340, 341; RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977).

[92] 27 Ohio App. 3d 163, 499 N.E.2d 1291 (1985).

[93] *Id.* at 164, 499 N.E.2d at 1292.

[94] *See supra* notes 41–44 and accompanying text.

[95] Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

[96] RESTATEMENT (SECOND) OF TORTS § 652D comments e, f (1977).

passing of time may cause a public figure to recede into the general public and then be entitled to the greater privacy afforded a private person.[97] There are well-known cases, however, allowing publicity about a former public figure long after he had receded from the public view.[98] It appears that cases must be decided on their facts as to whether the plaintiff is entitled to a higher degree of privacy.

While Ohio courts recognize this third form of the tort, no cases have been found that were successful. The requirements that (1) the matter be truly private; (2) it be publicized to the public at large; and (3) the publicity cause outrage or mental suffering, have not been met by the available cases. It is difficult to determine whether Ohio courts are especially conservative on this point or whether plaintiffs are bringing frivolous suits. Upon consideration of the cases examined in this section of the Note, it appears the answer is that plaintiffs are overly sensitive to the circumstances. Therefore, while an invasion of privacy can be claimed for unreasonable publicity given to private matters, actual cases are more likely to be successful by claiming infliction of emotional distress rather than invasion of privacy.

## V. PLACING ANOTHER IN A FALSE LIGHT

### A. *Introduction*

Ohio has neither accepted nor rejected the privacy tort of publicizing misleading information about another person. This form of invasion of privacy has also been described as placing another in a "false light."[99] The Ohio Supreme Court has stated that there is "no rationale which compels us to adopt the 'false light' theory of recovery in Ohio at this time,"[100] thus leaving the door open to a fact pattern that may support a claim for false light invasion of privacy.[101] The *Restatement* describes the tort of false light invasion of privacy

[97] Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931). This is one of the most famous cases concerning publicity given to a former public figure. The plaintiff was a prostitute who had been prosecuted, and acquitted for murder in 1918. She then married and became associated with persons who did not know of her past. In 1925 her past was exposed when the defendants made and distributed a movie based upon her experiences. The Fourth Circuit Court of Appeals held that the plaintiff could sue for invasion of privacy.

[98] Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940).

[99] RESTATEMENT (SECOND) OF TORTS § 652E (1977).

[100] Yeager v. Local Union 20, Teamsters, 6 Ohio St. 3d 369, 372, 453 N.E.2d 666, 670 (1983); Celebrezze v. Dayton Newspapers, Inc., 41 Ohio App. 3d 343, 344–45, 535 N.E.2d 755, 757 (1988).

[101] Although "false light" remains a possibility, the Ohio Supreme Court's view can be found in Justice Douglas' concurring opinion in Local Lodge 1297 v. Allen, 22 Ohio St. 3d 228, 234, 490 N.E.2d 865, 870–71 (1980). "Appellees urge several legal theories but each

as liability caused by: (1) placing another in a false light that "would be highly offensive to a reasonable person; and (2) acting with the "knowledge of or . . . in reckless disregard as to the falsity of the publicized matter *and* the false light in which the other would be placed."[102]

## B. *Rejection of False Light*

At this point in time it is unknown what fact pattern would be sufficient for the Ohio Supreme Court to allow recovery on a claim for placing another in a false light. Examples of facts not supporting a claim can be found in the leading case in Ohio, *Yeager v. Local Union 20, Teamsters*.[103] The plaintiff here was described on printed handbills and picket signs during a labor dispute as a "Little Hitler" who used "Gestapo tactics." The court based its decision in part on the fact that the communication "constitut[ed] expressions of opinions, not facts."[104] Another well-known case is based on a published political cartoon concerning the plaintiff.[105] The court applied the same reasoning in holding that the facts present did not compel recovery based on a false light theory.[106]

There is one lower court case in which a prima facie case for false light invasion of privacy was made. In *Filotei v. Booth Broadcasting Co.*,[107] the Cuyahoga County Court of Appeals specifically required that the act be intentional; however, this may not be the case at present given the trend discussed earlier.[108] However, *Filotei* did not go to the Ohio Supreme Court and has not been followed by other courts. Additionally, the Sixth Circuit has examined Ohio law since both *Filotei*[109] and *Yeager*,[110] and held that until the Ohio Supreme Court affirmatively accepts the false light invasion of privacy theory, no recovery may be allowed.[111]

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seeks to remedy the single alleged wrong of communication by appellants to third parties of appellants' low opinion of appellees or, in a word defamation." The appellees here were called "scabs" during a labor dispute.

[102] RESTATEMENT (SECOND) OF TORTS § 652E (1977) (emphasis added).

[103] 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983).

[104] *Id.* at 372, 453 N.E.2d at 670; *see also Celebrezze*, 41 Ohio App. 3d at 347, 535 N.E.2d at 759.

[105] *Celebrezze*, 41 Ohio App. 3d 343, 535 N.E.2d 755 (1988).

[106] *Id.* at 344–45, 535 N.E.2d at 756–58. The court used the rationale that the cartoon consisted of "opinion," not fact.

[107] No. 43454 (Cuyahoga County Ct. App. Dec. 10, 1981) (WESTLAW 1981 WL 4676) at 3. It must be noted that this is a pre-*Yeager* case.

[108] *See supra* notes 41–44 and accompanying text.

[109] No. 43454 (Cuyahoga County Ct. App. Dec. 10, 1981) (WESTLAW 1981 WL 4676).

[110] 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983).

[111] Angelotta v. American Broadcasting Corp., 820 F.2d 806, 807–08 (6th Cir. 1987).

### C. *The Effect of Statute of Limitations*

Ohio courts could have allowed recovery for false light invasion of privacy. For example, the statute of limitations for libel and slander is one year, while the statute of limitations on the tort of invasion of privacy is four years.[112] It could be argued that a claim for defamation that is time barred may be thought to be a compelling reason to allow a claim for invasion of privacy that is not time barred. It has been held that the privacy tort does not merge with defamation.[113] However, the Sixth Circuit, interpreting Ohio law, has held that when multiple claims are based upon the same facts, "the Ohio Supreme Court would apply the one-year statute of limitations period applicable to . . . defamation."[114] Therefore, the privacy tort of false light would not survive beyond the defamation cause of action if based upon the same facts.

The tort of placing another in a false light by publicizing private matters has not been expressly accepted or rejected by the Ohio Supreme Court. The court's policy of following the *Restatement* may be helpful in predicting the required proof if Ohio does recognize false light invasion of privacy in future cases.[115] At present, however, the Ohio Supreme Court has implicitly rejected the cause of action[116] and the Sixth Circuit has spoken negatively on the issue as well.[117]

## VI. DAMAGES

### A. *Compensatory Damages*

The rule on damages recoverable in invasion of privacy actions is found in *Housh v. Peth*[118] and more recently in *Columbus Finance, Inc. v. Howard*.[119] If a defendant is found to have invaded the privacy of another in any of the accepted forms described above, she will be liable for compensatory damages for any mental suffering[120] and any physical injury, or "that amount of money that will compensate and make whole the injured party."[121] The limitation on

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[112] OHIO REV. CODE ANN. §§ 2305.09, 2305.11 (Baldwin 1990).

[113] Guccione v. Hustler Magazine, 64 Ohio Misc. 59, 413 N.E.2d 860 (1978).

[114] Lusby v. Cincinnati Monthly Publishing Corp., No. 89-3854, slip op. (6th Cir. June 6, 1990) (904 F.2d 707 table) (WESTLAW database CTA6).

[115] RESTATEMENT (SECOND) OF TORTS § 652E (1977).

[116] Yeager v. Local Union 20, Teamsters, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983).

[117] *Lusby*, No. 89-3854 (June 6, 1990) (WESTLAW database CTA6).

[118] 165 Ohio St. 35, 133 N.E.2d 340 (1956).

[119] 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975).

[120] *Housh*, 165 Ohio St. at 40, 133 N.E.2d at 344.

[121] *Columbus Finance*, 42 Ohio St. 2d at 184, 327 N.E.2d at 658 (citation omitted).

damages is found in the level of injury required. *Housh* states that damages are allowed that "result from mental anguish."[122] A good description of the severity of injury required is found in *Paugh v. Hanks*.[123] Injury must be "both severe and debilitating" such as "neurosis, psychosis, chronic depression or phobia."[124] Although this is a heavy burden, it does prevent frivolous suits when a person's feelings are hurt or when a person is seriously insulted.

### B. *Punitive Damages*

There is some dispute over the issue of punitive damages. Punitive damages will only be awarded if the actor is proven to have actual malice, as defined by the Ohio Supreme Court in *Columbus Finance*,[125] or the mental injury is accompanied by contemporaneous physical injury. The court in *Columbus Finance* states that actual malice is "that state of mind under which a person's conduct is characterized by hatred or ill will, a spirit of revenge, retaliation, or a determination to vent his feelings upon the other persons."[126] Legal malice "infer[red] from or impute[d] to certain acts"[127] will not support a claim for punitive damages. However, there is some movement toward allowing punitive damages when actual malice is not present. For example, the Erie County Court of Appeals has allowed punitive damages with no contemporaneous physical injury and no actual malice proven.[128] The court allowed punitive damages in this instance because of the "outrageous invasion of the right[] to privacy and . . . [the right] to be secure in one's home . . . [when] such an egregious violation . . . would be tantamount to encouraging violence."[129] The holding in *Columbus Finance* has not been overruled. Therefore, the prevailing view in Ohio courts notwithstanding the movement toward allowing punitive damages when no actual malice is proven, or no contemporaneous physical injury is manifested, comports with the requirements discussed previously in *Columbus Finance*.[130]

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[122] *Housh*, 165 Ohio St. at 40, 133 N.E.2d at 344.

[123] 6 Ohio St. 3d 72, 78, 451 N.E.2d 759, 765 (1983).

[124] *Id.* at 78, 451 N.E.2d at 765.

[125] 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975).

[126] *Id.* at 183–84, 327 N.E.2d at 658 (citations omitted).

[127] Columbus Finance, Inc. v. Howard, 38 Ohio App. 2d 7, 11–12, 311 N.E.2d 32, 35 (1973), *aff'd in part*, 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975).

[128] Matthews v. Ohio Bell Tel. Co., C.A. No. E-82-8, C.P. No. 43709 (Erie County Ct. App. Oct. 15, 1982) (WESTLAW 1982 WL 6592).

[129] *Id.* at 10. The defendant's employee entered the plaintiff's home while she was away and he removed telephones from her kitchen and bedroom. The plaintiff did not discover the intrusion until she returned home and discovered her telephones had been taken.

[130] *See supra* notes 41–44 and accompanying text.

## VII. CONCLUSION

Ohio has allowed recovery for the tort of invasion of privacy since 1956.[131] At present only three of the four forms of the tort identified by Dean Prosser[132] and the *Restatement*[133] have been accepted in Ohio. The accepted forms include: (1) intrusion into private affairs; (2) appropriation of another's name or likeness; and (3) publicity given to another's private affairs, which has yet to be successfully sued upon in Ohio.[134] The fourth form, placing another in a false light, has not been accepted by the Ohio Supreme Court at the present time.[135]

The courts in Ohio have been conservative in allowing recovery for the tort of invasion of privacy, following the *Restatement* closely in almost every aspect. The one area in which Ohio has been aggressive is in considering recovery for negligence-based claims. This is basically a mirroring of the recognition of negligent infliction of emotional distress.[136] Given the difficulties encountered in proving intent to invade another's privacy this is a great aid to plaintiffs. This aspect may offer persons some protection from videotaping or intrusions similar to that found in *Judas Priest.*[137] However, the Ohio Supreme Court has not yet ruled on the question.

The unifying features of these cases are: (1) something truly private to the plaintiff must have been invaded; (2) the invasion typically must intend to outrage or cause mental suffering; (3) the invasion must be outrageous or cause mental suffering intolerable to a person of ordinary sensibilities; and (4) it must in fact be the plaintiff's privacy that was invaded.

As difficult as it may be to criticize a court that follows the *Restatement* so closely, there are areas in which Ohio courts could provide more direction or consistency in the law of invasion of privacy. The first is a clear expression of the standard applicable to a defendant's action. The Ohio Supreme Court needs to decide whether a person's privacy can be invaded negligently, or whether negligence is limited exclusively to infliction of emotional distress in the field of mental injury torts. Secondly, regarding false light invasion of privacy, if there are *no facts* that would compel the Ohio Supreme Court to accept this form of the tort, this must be stated. This author tends to believe that this is the case, but the court is hesitant to reject what the *Restatement* and Dean Prosser have seen fit to accept.

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131 Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

132 Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

133 RESTATEMENT (SECOND) OF TORTS § 652 (1977).

134 *See generally, Housh*, 165 Ohio St. at 35, 133 N.E.2d at 341.

135 Yeager v. Local Union 20, Teamsters, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983).

136 Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

137 *See supra* note 2.

Injured parties should be less concerned with tailoring their claims to fit the established forms of a cause of action than with being compensated for injury. If the court were to take action on those two points the author believes the law would be simplified and injured plaintiffs would be better able to recover when they are harmed.

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